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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

INTERVINE OUTDOOR ADVERTISING, INC.
Petitioner
v.
CITY OF GLOUCESTER CITY
and
CITY ZONING BOARD OF ADJUSTMENT FOR THE CITY OF GLOUCESTER CITY
Respondents

BRIEF OF RESPONDENT CITY OF GLOUCESTER CITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Appeal from the Supreme Court of New Jersey

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QUESTIONS PRESENTED

1) Whether the New Jersey legal standard for the severance of invalid provisions of an ordinance is both valid and constitutional, and permitted the lower court to sever the temporal restrictions of Section 1604.12 of Gloucester City's Sign Ordinance without declaring the entire ordinance unconstitutional.

2) Whether compelling reasons exist to grant Intervine's petition for a writ of certiorari in the instance wherein the lower courts followed, and did not contradict, established legal precedent including but not limited to this Courts ruling in Metromedia, Inc v. San Diego.

3) Whether Intervine's assertion that Gloucester City did not satisfy the standard set forth in Bell v. Stafford is inaccurate and ignores the clear weight of the testimonial evidence and legal rational set forth by the lower courts.

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CITATIONS OF THE CASE BELOW

The unreported New Jersey Supreme Court decision which denied Intervine's Petition for Certification is included at page A-1 of Petitioner's Appendix.

The Superior Court of New Jersey, Appellate Division opinion is reported at 290 N.J. Super. 78 (App. Div. 1996) and reproduced in full beginning at page A-2 of Petitioner's Appendix.

The unreported Superior Court of New Jersey, Law Division opinion is included in the City of Gloucester City's Appendix which begins at page A-18.

JURISDICTIONAL STATEMENT

Final judgments rendered by the highest court of a State may be reviewed by this Court by writ of certiorari pursuant to 28 U.S.C. § 1257(a). Upon examination of Intervine's' Petition and Respondents' briefs in opposition to Intervine's Petition, jurisdiction should be denied by this Honorable Court.

STATUTORY PROVISIONS INVOLVED

1) Gloucester City Zoning Ordinance, Article IV, Section 415.01, sign standards in Shoreline Overlay District (set forth herein at page 9).
2) Gloucester City Zoning Ordinance, Article XVI, Section 1601-1605, incorporated herein in full beginning at A-11 of Petitioner's Appendix.
3) Gloucester City Zoning Ordinance, Article XXV, Section 2501, (set forth herein at page 7).

STATEMENT OF THE CASE

Intervine has filed a Petition for a Writ of Certiorari to this Court seeking (1) to have a municipal Zoning Ordinance declared unconstitutional on the grounds it impermissibly censors commercial and noncommercial speech; and (2) a finding that the New Jersey Supreme Court committed reversible error by concluding a severance clause incorporated in the Zoning Ordinance permitted the court to eliminate a single unconstitutional temporal restriction within one sub-section of the ordinance without declaring the entire ordinance invalid.

The City of Gloucester City opposes Intervine's Petition on the basis that the lower court decisions are grounded in established legal precedent and do not conflict with existing Federal or other New Jersey case law.

PROCEDURAL HISTORY

In 1992, Petitioner Intervine Outdoor Advertising, Inc. ("Intervine") applied to the Gloucester City Zoning Board of Adjustment ("Board") for a use variance pursuant to N.J.S.A. 40:55D-70(d) and bulk variances pursuant to N.J.S.A. 40:55D-70(c). Intervine sought to construct three 960 square foot billboards in Gloucester City's Shoreline Overlay District, a prohibited use in the district. Public hearings on Intervine's application were conducted by the Board on September 10, 1992 and October 8, 1992. The Board voted to deny Intervine's application at the October 8, 1992 hearing.

On December 23, 1992, Intervine filed a Complaint in lieu of Prerogative Writs in the Camden County Superior Court, Chancery Division challenging the Board's denial of its application and the constitutionality of Gloucester City's Sign Ordinance.

On February 7, 1994, the trial court conducted a formal hearing to consider the validity of the Gloucester City Sign Ordinance pursuant to the holding of Bell v. Stafford Twp., 110 N.J. 384, 591 A.2d 692 (1988). Gloucester City and the Board presented live testimony in support of the constitutionality of Gloucester City's Zoning Ordinance. The former Chairperson of the Gloucester City Planning Board and three former members of Gloucester City Council testified on behalf of Gloucester City and the Board. Intervine presented no live witnesses at the hearing.

On April 14, 1995, the trial court issued an Order and letter opinion dismissing Intervine's Complaint in lieu of Prerogative Writs. Intervine filed a Notice of Appeal with the Superior Court, Appellate Division on May 26, 1995. The Appellate Division rendered a unanimous opinion on May 2, 1996 affirming the Judgment of the Camden County Superior Court Chancery Division dismissing Intervine's Complaint in lieu of Prerogative Writs.

In upholding the denial of the zoning variance to Intervine, the Appellate Division held that one section of the City's ordinance was unconstitutional, specifically Section 1604.12. The Appellate Division held the temporal restrictions set forth in the section were unconstitutional as imposing a content-based regulation without a compelling state interest. The Appellate Division further held that since the Zoning Ordinance contained a severance clause, the offending

provision would be severed, maintaining the validity of the balance of the ordinance. The Appellate Division agreed with Intervine's constitutional challenge to the specific provision of the Zoning Ordinance and further held the remaining provisions of the Zoning Ordinance provided a legal basis for the Board's denial of a zoning variance.

On May 16, 1996, Intervine filed a Notice of Appeal along with a Petition for Certification with the Supreme Court of New Jersey. By Order dated July 11, 1996, the New Jersey Supreme Court denied Intervine's Petition for Certification.

On October 7, 1996, Intervine filed a Petition for Writ of Certiorari with this Court. Gloucester City Zoning Board filed opposition dated November 7, 1996.

COUNTER STATEMENT OF FACTS

Gloucester City is a residential community with its population consisting mainly of low and middle income families. The City, located across the Delaware River from South Philadelphia, is currently trying to recapture its historical significance and economic viability by developing its waterfront on the Delaware River, which includes the land adjacent to the Walt Whitman Bridge, at which Intervine seeks to construct billboards. Gloucester City officials and residents have consistently opposed the erection of billboards adjacent to the Walt Whitman Bridge for a variety of reasons, including the preservation of aesthetics in general, fear of obstruction of the City's view of the Delaware River corridor, and fear of detracting from the entrances to the City.

In 1983 the Gloucester City Planning Board hired Planning Research and Development Company to prepare a Master Plan for the City. N.J.S.A. 40:55D-28(b)(1) requires that a municipality's Master Plan include a statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based. Accordingly, the Gloucester City Master Plan included a "Goals and Objectives Element". Object F of the goals and objectives element of the Master Plan was to "Clean up and Beautify Entrances to the City." Means 4 to achieve this objective was to "prohibit new billboards and attempt to retire old ones." Based upon review and recommendation of the Gloucester City Planning Board, the Gloucester City Mayor and City Council readopted the Master Plan on April 15, 1991. The Master Plan readopted by Gloucester City in 1991 included the objective of beautifying entrances to the City through the means of prohibiting new billboards.

On April 2, 1987 Gloucester City Mayor and Council adopted the Gloucester City Zoning Ordinance. Prior to adoption of the Zoning Ordinance, the City Council considered the Master Plan which had been prepared under the supervision of the Planning Board. An objective of the city's Master Plan is to rezone the waterfront area from industrial to mixed use development and to clean up and beautify the entrances to the city by various techniques, which include prohibiting new billboards and attempting to retire old ones. (See Petitioner's Appendix at A-4). The Zoning Ordinance established the Shoreline Overlay District which includes all lands within 500 feet of all Delaware River Shorelines of the City. Gloucester City's Zoning Ordinance, Article IV, Section 415.01 which regulates sign standards in the Shoreline Overlay District provides that "Ground mounted signs are permitted when not

located in water view corridors or in an area which impairs visual access to water view corridors." This ordinance is consistent with the Master Plan means of prohibiting new billboards.

On September 10, 1992 and October 8, 1992 the Board heard testimony on the application of Intervine for use and bulk variances to construct three billboards adjacent to the Walt Whitman Bridge. Intervine is a company engaged in erecting and maintaining freestanding, outdoor advertising structures. (See Petitioner's Appendix at A-4). The proposed billboards were to be double-faced, steel , freestanding pole signs. Each sign would be externally lit at the bottom, measuring 16 feet by 60 feet, and would be located approximately 30 feet above the bridge roadway, approximately 90 feet above the ground, and approximately 30 feet from the bridge rights-of-way. (See Petitioner's Appendix at A-5). Intervine proposed to use the signs for both commercial and noncommercial advertisements.

The Board acknowledged expert testimony on behalf of Intervine in support of the safe construction of the billboards, the economic advantages of the erection of the billboards and the impact of the billboards on traffic safety. The Board also acknowledged substantial public testimony in opposition to the construction of the billboards as the erection of billboards would be detrimental to the City's visual environment and property values in addition to having a deleterious effect upon the development of the waterfront and surrounding historic residential areas. The Board concluded that Intervine's application was a substantial departure from the signage requirements of the Zoning Ordinance, that the application could not be granted without substantial detriment to the

public, health, safety and welfare of the City, and that Intervine had not shown special reasons why the application should be granted in spite of the detriment such construction would have to the community. (See Petitioner's Appendix at A-5).

LEGAL ARGUMENT

Review on a writ of certiorari is a matter of judicial discretion and should be granted only for compelling reasons. In considering granting of a writ, the Court will consider: (1) a state court decision which has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals; and (2) wherein a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court. U.S. Sup.Ct.Rule 10(b) and (c).

The final judgment of the Appellate Division, upon whose decision the New Jersey Supreme Court denied certification, is premised on well-established State and Federal authority. The Appellate Division's decision does not conflict with any other decision of a state court of last resort or of a United States Court of Appeals. Moreover, the lower court decisions reflect proper adherence to existing Federal caselaw including Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981), the case upon which the Petitioner largely bases its argument for granting a writ of certiorari.

I. THE SEVERANCE CLAUSE OF THE CITY'S ZONING ORDINANCE IS VALID AND CONSTITUTIONAL AND PERMITTED THE LOWER COURT TO SEVER THE TEMPORAL RESTRICTIONS OF SECTION 1604.12 OF THE ZONING ORDINANCE WITHOUT DECLARING THE ENTIRE ORDINANCE UNCONSTITUTIONAL

The Gloucester City Zoning Ordinance contains a "severance clause":

> "Should any section or provision of this Ordinance for any reason be declared invalid by the Courts, such decision shall not effect the validity of this Ordinance as a whole or any other part thereof." Gloucester City Zoning Ordinance, Article XXV, Section 2501.

New Jersey law, relied upon by the Appellate Division, interprets such clauses to create a rebuttable presumption that any part of the ordinance which is found to be invalid is severable. Manalapan Realty, L.P. v. Twp. Committee of Twp. of Manalapan, 272 N.J. Super. 1, 15, 639 A. 2d 318 (1994) citing Inganamort v. Borough of Fort Lee, 72 N.J. 412, 422, 371 A.2d 34 (1977); Helmsley v. Borough of Ft. Lee, 78 N.J. 200, 237, 394 A.2d 65 (1978).

Given the legal presumption of severability, New Jersey caselaw prescribes an analysis to validate the remaining portions of an ordinance. The validity of an ordinance from which a provision or provisions have been severed is contingent upon whether, on balance, the remainder of the

regulations are functionally self sufficient to contain the essentials of a complete enactment. Gardens v. City of Passaic 130 N.J.Super. 369, 380, 327 A.2d 250 (1974). If a part of an ordinance is adjudged invalid and the remainder can stand independently without conflict with the overall basic purpose of the governing body, New Jersey caselaw upholds the validity of the remaining ordinance should be allowed to do so by the Courts. Harry Grant Center Corp. v. Mayor and Council of Borough of Fort Lee, 235 N.J. Super. 491, 501, 563 A.2d 449 (1989).

Metromedia, Inc. v. San Diego recognizes a state court's ability and responsibility to determine the meaning and application of a severance clause. Metromedia, 490 U.S. at 521, Note 26. See Liggett Co. v. Lee, 288 U.S. 517, 541 (1933) as cited in Metromedia at 521, Note 26 ("The operation of this severability clause consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court."). In its opinion, the Appellate Division completed the analysis required under State law and concluded "...the absence of the temporal restrictions contained in subsection 12 of Section 1604 will not preclude noncommercial signs and will not truncate the entirety of the sign provisions into incomprehensibility." (See Petitioner's Appendix at A-10).

Had the lower court invalidated the entirety of the signage section of the Zoning Ordinance (Section 1604), denial of a variance is still clearly supported by the remaining Articles of the Zoning Ordinance. Within Article IV, specifically Section 415.01, sign standards in Shoreline Overlay District contain the content neutral requirement that:

> "Ground mounted signs are permitted when not located in water view corridors or in an area which impairs visual access to water view corridors." Gloucester City Zoning Ordinance, Article IV, Section 415.01.

This provision provides legal basis within the remaining provisions of the Zoning Ordinance, independent of the protested Sign Ordinance provisions, for the Zoning Board's denial of Intervine's variance. The Zoning Board's denial of Appellant's variance request would continue to be supported by valid regulation which passes constitutional muster.

The severance of the offending provision of the Zoning Ordinance follows established principles of New Jersey law. There exists no conflicts between the legal principles followed and any Federal issues. Intervine's Petition should be denied.

A. The Decision of the Lower Court Upholding the Validity and Constitutionality of the Remainder of the City Zoning Ordinance is Consistent with Metromedia v. San Diego and Its Progeny

The Appellate Division examined the remaining provisions of the City Zoning Ordinance under the standards set forth by this Court in Metromedia and by the New Jersey Supreme Court in Bell and concluded the remaining Ordinance did not unconstitutionally infringe on protected interests. Review of the facts underlying Metromedia clearly demonstrates the differences between San Diego's total ban and Gloucester City's reasonable regulatory provisions. In Metromedia, the City Ordinance banned all signs advertising off-site commercial and most non-commercial advertising. Id. at 503.

The Gloucester City ordinance limits the size of signage regardless of content and permits various modes of communication for both commercial and noncommercial speech. (See Gloucester City's Zoning Ordinance, Article XVI, Sections 1604.7, 1604.8, 1604.9 and 1604.12 at A-15 and A-16).

In Metromedia, the underlying ordinance afforded a greater degree of protection to commercial speech than noncommercial speech. Metromedia, 490 U.S. at 513. Gloucester City's ordinance affords no greater protection for commercial speech. Unlike Metromedia, Gloucester City's ordinance does not provide for a broad exception for onsite commercial advertisements while limiting and effectively banning offsite noncommercial advertisements. Instead the ordinance is much broader than San Diego's ordinance declared unconstitutional in Metromedia as Section 1604.12 does not differentiate between or prohibit either onsite or offsite noncommercial advertisements.

The rational for declaring San Diego's ordinance unconstitutional was that "insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages." Id. The Gloucester City ordinance limits billboards, whether they contain commercial or noncommercial advertisements. (See Sections 1604.7, 1604.8, 1604.9 and 1604.12 at A-15 and A-16). Moreover, the noncommercial signs permitted in the remaining Section 1604.12 of Gloucester City's ordinance are much broader and wider in scope than those areas of noncommercial speech enumerated in San Diego's ordinance. Id. at 514-515. Because the range of choice for noncommercial speech is so much broader in the Gloucester City ordinance, Intervine's concerns and assertions that Gloucester City officials will become the

final "arbiters" and "speech censors" is both exaggerated and unfounded.

II. THE TRIAL COURT'S FACTUAL FINDINGS AND THE APPELLATE COURT'S LEGAL CONCLUSIONS FOLLOW THE STANDARD OF BELL v. STAFFORD

In Bell v. Stafford Twp., 110 N.J. 384, 541 A.2d. 692 (1988), the New Jersey Supreme Court set forth a standard for factual inquiry necessary to evaluate the constitutional validity of a City Zoning Ordinance under the legal principles enunciated in Metromedia, Inc. v. San Deigo, 453 U.S. 490, 101 S.Ct. 2882 (1981) and Central Hudson Gas & Electric v. Public Service Comm'n, 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980) Id. at 397.

> The municipality must satisfactorily demonstrate a legitimate governmental interest to be served by the enactment and demonstrate a reasonable factual basis indicating that the regulation advances the governmental interest and is no more expansive than necessary in advancing that interest. Bell, supra. at 395.

In February 1994, the trial court heard testimony of Gloucester City officials regarding the City's interest in sign regulation and the manner by which the City's Ordinance advanced those interests. The trial court found the City met its burden under Bell and the Appellate Court upheld those factual findings.

The facts in this case are clearly distinguishable from those in Bell. In Bell, there was a blanket prohibition against all outdoor off-premises signs located in the Township. Id at 386. The Gloucester City zoning ordinance permits a wide variety of outdoor signs. In Bell, the Appellate Division noted that "the record is almost totally devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the ordinance has advanced those interests." Id at 396. In this case, a Bell hearing was held and factual findings rendered by the trial court finding substantial interest in advancing aesthetic and reasonable regulation furthering that interest. The City's testimony of former local officials, the City's Master Plan and this evidence was found credible by the trial court.

Under New Jersey state law, a municipality's Master Plan is the instrument which controls local land use regulation. The Master Plan is to be prepared by the municipality's Planning Board. N.J.S.A. 40:55D-28(a). The governing body of a municipality is empowered to enact or amend its local Zoning Ordinance which regulates land use within the municipality. N.J.S.A. 40:55D-62. This statute requires that before a Zoning Ordinance may be adopted, the municipality must have a Master Plan prepared by the Planning Board. The Zoning Ordinance must be substantially consistent with the Master Plan. N.J.S.A. 40:55D-62(a). The Gloucester City Planning Board began preparation of the Master Plan sometime in 1983. The Gloucester City Master Plan was formally adopted in 1987.

The Gloucester City Zoning Ordinance, which implements the Master Plan, was approved on April 2, 1987. Gloucester City and the Zoning Board presented the Trial Court with testimony from the Planning Board Chairperson who served

from 1982 through 1990; a City Council member who began his term in January 1987; a City Council member who served from 1981 until the end of 1986; and another City Council member who served from 1984 through the end of 1986.

The lower court upheld the trial court's finding that Gloucester City "has met its burden and it has been clearly shown that a sufficiently substantial governmental interest is furthered by the scope of the ordinance." (See attached Appendix at A-41). The testimony of these former City officials constitute adequate, substantial and credible evidence supporting the factual findings of the trial court. The record below established to the satisfaction of the lower courts that legitimate governmental interests were served by the sign regulation and that the enactment reasonably advanced those interests in accordance with the legal standards set out in the caselaw.

CONCLUSION

No compelling reasons exist to grant Intervine's Petition for a Writ of Certiorari. Upon careful review, Gloucester City's ordinance does not violate the Petitioner's first amendment rights as enunciated and protected by this Court in Metromedia, Inc. v. San Diego. Furthermore, the lower courts' decisions do not contradict the decision of another state court of last resort or of a United States Court of Appeals on the issues of the First Amendment, severability of the municipal ordinance or whether the City failed to consider less restrictive means of regulating commercial speech.

Based on the foregoing, The City Of Gloucester City respectfully requests that this Honorable Court deny Intervine's Petition for a Writ of Certiorari.

Respectfully submitted,

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